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**M.R. JOELSON, An International Antitrust Primer: A Guide to the Operation of the United States, European Union and Other Key Competition Laws in the Global Economy, 2nd edn., Kluwer Law International, The Hague 2001, xix + 496 pp., €180/US\$165/UK£114. ISBN 90-411-9854-7.**

R.A. Abdullah Khan

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**BOOK REVIEWS**

J.I. CHARNEY; R.W. SMITH, eds, *International Maritime Boundaries*, Volume IV, Martinus Nijhoff Publishers, The Hague 2002, xxii + 579 pp., US\$181/UK£121/€189. ISBN 90-411-1954-X.

This fourth volume of *International Maritime Boundaries* is a second update of the original two volume project of the American Society of International Law, which was completed in 1993. This project consisted of overall assessments of the state of international maritime boundary law and practice and an analysis of all maritime boundaries which had been agreed upon since the end of world war II. Volume III of the project was published in 1998.

Volume IV of *International Maritime Boundaries* is dedicated to Jonathan Charney, who passed away last September. Professor Charney was a leading international law scholar, and the law of the sea was one of his special interests. Among other things, he was involved in the negotiations on the United Nations Convention on the Law of the Sea and was a frequent consultant on international boundary issues. The International Maritime Boundaries project, which in no small part was realized under his guidance, will be a lasting memory to professor Charney's contributions to the law of the sea.

The present Volume of *International Maritime Boundaries* contains reports on maritime boundary agreements which have been concluded subsequent to the date that Volume III of the project went to press. Volume IV follows the same format as was employed in Volumes I to III. Information on the agreements is grouped regionally, distinguishing North America; Middle America/The Caribbean; South America; Central Pacific/East Asia; Indian Ocean/South East Asia; Persian Gulf; Mediterranean/Black Sea; Northern and Western Europe; and Baltic Sea.

The format of reports on bilateral agreements has also been maintained. After a summary each report discusses the following considerations: political, strategic and historical; legal regime; economic and environmental; geographic; islands, rocks, reefs and low-tide elevations; baselines; geologic and geomorphologic; method of delimitation; technical; and others. Each report moreover contains a conclusion, the related law in force for the parties to the agreement, and a list of references and additional reading.

Apart from providing information on new bilateral agreements, Volume IV contains a number of corrigenda and additions to the reports on individual boundaries contained in the earlier volumes. As was the case for Volume III, Volume IV again has a cumulative index, covering all four volumes of *International Maritime Boundaries*.

Volume IV, like Volume III, does not give an update of the overall assessments of the state of international maritime boundary law and practice contained in the original two volumes. As the editors pointed out in Volume III, at that time it was not believed that there had been developments that warranted such an approach (p. xx). There can be little doubt that this assessment still holds true.

The introduction to Volume IV by Charney does suggest that there has been a consolidation of the rules of maritime delimitation law. He observes that state practice

‘has become gradually more coherent despite notable variations. While an overall mandatory rule of international law cannot be pronounced, one can report at the same time the development of elements of that rule of law that is more discriminating than the particularly vague language found in Articles 74 and 83 (if not also Article 15) of the 1982 Convention on the Law of the Sea’ (p. xxii).

This finding would seem to be borne out by the continued significance of the method of equidistance in the bilateral delimitation agreements that are reported upon in the present Volume of *International Maritime Boundaries*. A review of these agreements indicates that seven of them have relied almost exclusively on the equidistance method. Eleven agreements can be considered to have established maritime boundaries based on a variation of the equidistance line because of the presence of special circumstances. Only four agreements establish boundaries, which do not seem to take into account the equidistance method. However, three of these agreements also delimit part of the boundary concerned by the equidistance method or a variation thereof. The recent case law on maritime delimitation also has given an important role to equidistance, consistently using the equidistance line as a provisional line, which may be adjusted because of the presence of relevant or special circumstances.<sup>1</sup> However, as is also the case for state practice, it is difficult to ascertain with any precision as to why the presence of a certain relevant or special circumstance leads to a specific shift of the provisional equidistance line.

It is to be hoped that *International Maritime Boundaries* will be continued in the future. It remains a basic research tool for lawyers, geographers, political scientists and others interested in the comparative research of maritime boundaries. Since Volume IV went to press there have been concluded further bilateral delimitation agreements, and maritime delimitation also is an issue in two cases presently pending before the International Court of Justice.

One consideration to take into account in deciding whether or not to acquire Volume IV of *International Maritime Boundaries* is the fact that the first three volumes of *International Maritime Boundaries* have been made available on CD-Rom.<sup>2</sup> This CD-ROM may be updated to also include the information contained in Volume IV. The additional features of the original CD-ROM, as compared to the printed volumes, make it a useful research tool. For instance, it is much easier to find and check all entries of a specific keyword in the database than in the printed version.

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1. Since Volume III of *International Maritime Boundaries* went to press three cases have been decided. This concerns the Judgments of the International Court of Justice of 16 March 2001 in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and of 10 October 2002 in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* and the Award of the Arbitral Tribunal in the Second Stage of Proceedings (Maritime Delimitation) between the State of Eritrea and the Republic of Yemen of 17 December 1999.
2. For the review of this CD-ROM see 47 *NILR* (2000) pp. 253-255.

M.R. JOELSON, *An International Antitrust Primer: A Guide to the Operation of the United States, European Union and Other Key Competition Laws in the Global Economy*, 2nd edn., Kluwer Law International, The Hague 2001, xix + 496 pp., €180/US\$165/UK£114. ISBN 90-411-9854-7.

Mark Joelson's *International Antitrust Primer* is a substantial revision of the book initially published in 1974 by him and the late Earl W. Kintner. It contains an instructive foreword by Diana P. Wood in which she takes notice of the fact that although the antitrust law regimes of the US and the European Community do not discriminate on the basis of nationality, observers sometimes wonder if nationalistic considerations influence enforcement decisions. Her personal view is that the answer is 'no', but remarks that this does not mean that this kind of taint could not occur, and there is no system that is utterly immune from abuse (p. xiv). Considering the divergent treatment which the regulators FTC and European Commission accorded in 1997 to the Boeing Company's acquisition of Mc Donnell Douglas Corporation and the fact that their only significant competitor was the European consortium Airbus Industrie (p. 184) I venture the opinion that there may be some truth in Bertrand Russell's words. Russell once remarked that in all the more important industries the tendency towards monopoly is irresistible, and there comes a moment when in practice either the industries take over the state, or the state takes over the industries, even where in theory it is being avoided. Consequently, competition in the modern world is between nations, not between individual producers. Whether one agrees with Russell's point of view or not, it makes an interesting perspective for the reading of the last chapter (15) that explains the tedious search for a global competition policy.

Joelson's book is designed to provide an explanation of competition law, as a regime of both domestic and international law, for use of the businessperson, journalist, student, or lawyer, who does not specialize in this field, but desires to be familiar with it in context. The principal focus of the book is on describing the application of some key national and regional competition laws to international transactions (p. xvii). Notwithstanding the intended audience of the author, I would dare to say that it can fairly be seen as a concise treatise that assumes a good knowledge of legal and economic concepts.

*An International Antitrust Primer* consists of fifteen chapters and five Appendices, which include a list of national competition laws and agencies, and the Antitrust Enforcement Guidelines for International Operations of the US Department of Justice and Federal Trade Commission. The book can be divided into three parts. (1) Chapters 2 through 8 examine United States antitrust law. (2) Chapters 9 through 13 are concerned with European Community Competition Law. (3) Chapter 14 covers summaries of Key Competition Laws of Canada, Mexico, United Kingdom, and Japan. These three parts are enclosed by chapter 1 that provides an Overview of Competition Law Development around the World, and finally chapter 15 titled 'The Search for a Global Competition Policy' which explores themes such as the strengths and weaknesses of legal nationalism, efforts to 'internationalize' competition law enforcement through the OECD, UNCTAD, WTO, and the prospects for future cooperation on competition policy.

Chapters 2 and 5 through 8 make up an excellent introduction to the US antitrust laws, which is even indispensable for the proper understanding of the part of the book that comprises EC competition law. Unless one is familiar, for instance, with Section 2 of the Sherman Act against monopolization, it is hard to grasp the comparison the author makes of this Section of the Sherman Act with Article 82 EC against abuse of a dominant position, and to perceive the meaning of his interesting point that after reviewing the jurisprudence relating to the two concepts, one gets the sense that the differences between them are more theoretical than practical (p. 273). This counts likewise for the territorial application for EC competition law where Joelson observes that as a practical matter, it is difficult to see much difference between the effects doctrine applied under US antitrust law and the implementation standard that the European Court of Justice has adopted in the *Woodpulp* case (p. 210). Despite the seeming convergence of the case law, I think one should also be quite aware, as Ehrenzweig has written, that courts and lawyers everywhere recognize and admit what we do when we 'apply' foreign rules. Namely, that we interpret our own laws with our own techniques in light of our own views on 'lawness,' and that we act as architects rather than as 'photographers' of the foreign rule. Everything considered this carries the implication that Joelson is inevitably a learned architect in these affairs.

Chapters 3 through 4 deal with the application of US antitrust law to international transactions and foreign parties, and US enforcement procedure, respectively. This is in many ways as Wood rightly expresses in her foreword, for those who wish to understand the international dimension of US antitrust laws, the most important part of the book. Because antitrust disputes involve the extraterritorial reach of the US antitrust statutes with still increasing frequency it is wise to have the solid knowledge as is offered here by Joelson of foreign jurisdictional barriers that limit the application of US antitrust statutes to transnational business activity. He elegantly covers the foreign commerce to which the Sherman Act applies, the Foreign Trade Antitrust Improvement Act of 1982 and the consequential *Hartford Fire Ins. Co. v. California* (1993) in which the US Supreme Court considered whether principles of international comity should preclude the exercise of jurisdiction over British reinsurance companies, which were alleged to have conspired with American insurance

companies to limit certain forms of insurance coverage (p. 43). Other subjects that are examined concern the limits on the extraterritoriality as the *act of state* doctrine, the Foreign Sovereign Immunities Act (1976), which immunizes a foreign government from suits challenging its acts, the Export Trading Company Act of 1982 that provides limited antitrust dispensations for export-related collaboration by US competitors, and the increasing number of Antitrust Cooperation Agreements (p. 65).

As already referred to, the second part of the book covers EC competition law in chapters 9 through 13. After an overview in chapter 9 of the composition and powers of the principal institutions of the EC, the competition law rules and their enforcement, chapter 10 continues with a lucid account of Article 81 EC. Attention is paid to the thorough overhaul of the enforcement regime that has in the meanwhile resulted in Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 EC (*OJ* 2003, No. L1/1). The Regulation shall apply from 1 May 2004 and is based on a radical decentralization of the enforcement of EC competition law. Notification of agreements is abolished, as is the Commission's monopoly over Article 81(3) EC. National courts and national competition authorities are empowered to apply Article 81 EC in its entirety. The chapter focuses on the regulatory framework of horizontal relationships. This has mainly been laid down in Commission Regulation No. 2658/2000 relating to specialization agreements (*OJ* 2000, No. L304/3), Regulation No. 2659/2000 relating to R&D agreements (*OJ* 2000, No. L6304/7), and the intricate Horizontal Guidelines that were published in the *Official Journal* of 6 January 2001 (*OJ* 2001, No. C3/02).

The following chapter 11 discusses the application of Article 81 EC in the vertical context, i.e., to relations with suppliers, customers or licensees. The centerpiece of this chapter forms Regulation No. 2790/1999, a new block exemption on the application of Article 81(3) EC to categories of vertical agreements and concerted practices (*OJ* 1999, No. L336/21) and the Guidelines on Vertical Restraints, to be read with the aforesaid Regulation, that the Commission published on 13 October 2000 (*OJ* 2000, No. C291/1). The chapter rounds off with an examination of the exercise of intellectual property rights that relate to patents, knowhow, trademarks, and copyrights. Consequently, it looks closely at these rights and the free movement of goods as intellectual property rights have to be evaluated in terms of the competition law provisions and with reference to Articles 28-30 EC (p. 256).

Chapter 12 explores the prohibition of Article 82 EC to abuse a dominant position. The principle of dominance is discussed and enough types of practices which have been found abusive for the purposes of applying Article 82 EC are set out. I doubt, however, whether it matters to subdivide the situations to which Article 82 EC can apply into exclusionary and exploitative abuse (p. 273). It is common to do so in literature, but in practice it shows difficult to explain the criteria as the same conduct can often be deemed both exclusionary and exploitative. In my view, the subdivision in question involves a false idea that does not provide explanatory knowledge indeed. Joelson sketches the development of an essential facility doctrine on p. 284 but omits the *Bronner* decision of the European Court of Justice from 1998 [1998] ECR I-7791, which has been addressed justly as a turning point for essential

facilities in EC competition law. A more serious point relates to the way the significant, but complex Article 86 EC, is dealt with on p. 285. The pertaining cases *Höfner and Elser v. Macroton* [1991] ECR I-1979, and *Port of Genoa* [1991] ECR I-5889, are assessed out of context and simplified as the author seems to imply that these cases primarily belong in the general category of Article 82(b) EC that provides that an abuse of a dominant position may consist of 'limiting production, markets or technical development to the prejudice of consumers'. The jurisprudence under Article 86 EC has indeed inspired vexing questions about the extent to which it is possible for a Member State to entrust certain activities to a public monopoly, or to a private firm which has exclusive rights. My suggestion would be to treat this arcane subject in a separate chapter in order to achieve the coherence which is required.

Merger control in the EC is aptly discussed in chapter 13. The text is naturally centred on EC Merger Regulation 4064/89 and its enforcement (*OJ* 1990, No. L257/13) as amended by Council Regulation (EC) No. 1310/97 of 30 June 1997 (*OJ* 1997, No. L180/1). Joelson rightly says that although the usage of the word 'dominance' in the Merger Regulation is the same as its usage in Article 82 EC, the analytical process required may differ somewhat (p. 296). Namely, in the circumstances of the Merger Regulation the analysis is a forward looking educated guess and more complex than in Article 82 EC cases where the analysis is retrospective in nature. Collective dominance with respect to mergers is dealt with on p. 298 and joint dominance regarding Article 82 EC was covered on p. 286 of chapter 12. I would have thought that some readers might have welcomed Joelson's view on the concrete differences between these two categories. It would not be a surprise to me to learn from his US experience that EC competition law regarding Article 82 EC and the so-called joint dominance is so muddled for the reason that it most likely entails the 'shared monopoly' theory to attack oligopolies that has been discarded 30 years ago in the US. The cause for this discard was that the FTC and the Department of Justice eventually realized that they had not developed hard evidence that would convince US courts that the shared monopoly theory could be reconciled with the jurisprudence and economic rationale of the antitrust laws.

Chapter 14 discusses the antitrust regimes of Canada, Mexico, United Kingdom and Japan. It succinctly provides the background and overview of the legislation, the enforcement and the international cooperation on competition law matters in these jurisdictions.

The book concludes with chapter 15 concerning the search for a global competition policy. Joelson argues that while the commerce is global, the regulation of the competitive process clearly remains non-global and, except in the case of the European Union, essentially national in scope. Although competition authorities attempt to function effectively by increased levels of cooperation, their application of national regulatory tools to transnational business practices is inevitably a clumsy process. International business itself pays a substantial price for the Balkanized system. Although legitimate and illegitimate business activity benefits from the lack of centralized scrutiny to some extent, the system of multiple, and sometimes inconsistent regulation often proves to be frustrating and needlessly expensive (p. 388). Joelson discusses several approaches to the problem in the light of efforts from the OECD, UNCTAD, and



WTO. Where he explores prospects for future cooperation on competition policy he makes the fundamental point that support for open competition is broad but not deep, and the amount of weight accorded to competition policy in a given case may depend on whose ox is being gored as can be illustrated with the Boeing-McDonnell Douglas merger. As alluded to before in this review the home country of the merging parties, the US, posed no antitrust obstacles for the transaction, while a major reason for the concern of the EU was the threat that the merger presented for Airbus Industrie, the third factor in the relevant industry and a European company.

This is a learned and well written book. It offers a richly detailed study of important antitrust regimes in the global economy that will duly inform anyone who is interested in this field of increasing importance.

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J. KROPHOLLER, *Europäisches Zivilprozeßrecht, Kommentar zu EuGVO und Lugano-Übereinkommen*, 7. Auflage, Verlag Recht und Wirtschaft, Heidelberg 2002, 672 pp., €138. ISBN 3-8005-1297-1.

In 2002 a new, completely revised edition of Kropholler's *Europäisches Zivilprozeßrecht* had been published. Compared to the previous edition, the 7th edition has grown only 50 pages, although it not only includes a commentary on the Brussels I Regulation 44/2001<sup>1</sup> and on the Lugano Convention, but also a brief overview of the Brussels II Regulation 1347/2000.<sup>2</sup> The structure of the book has not been changed. In the introduction Kropholler points out that for the time being a distinction in the applicability of the Brussels I Regulation, the Brussels Convention and the Lugano Convention has to be made. Mention is also made of more new 'European' rules on private international law in the field of civil and commercial matters, such as the Service Regulation 1348/2000<sup>3</sup> and the Regulation on Taking of Evidence in Civil and Commercial Matters 1206/2001.<sup>4</sup>

Although the structure of the Brussels I Regulation is the same one as that of the Brussels Convention, some material changes were made by the Regulation. Through the transformation from the Convention into the Brussels I Regulation, its provisions became part of the *acquis communautaire*. Thus, there is no need for a Protocol on interpretation by the Court of Justice. The power of the national courts to ask the Court to give a preliminary ruling is now based on Article 68 EC Treaty.

In the reviewer's opinion, one of the most important changes is the adjustment of the wording of Article 5(1) on the jurisdiction of the court of the place of performance of a

contractual obligation. According to Article 5(1) of the Brussels Convention a person domiciled in a contracting state may, in another contracting state, be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question. The European Court of Justice ruled that in cases where the obligation is not yet performed and the contract lacks a provision in this respect, the place of performance is to be determined according to the law applicable to the contract.<sup>5</sup> As this led to many difficulties in the case law, Article 5(1)(b) of the Brussels I Regulation gives an autonomous definition of the place of performance in two specific situations, namely for the contracts for sale of goods and for service contracts. In the case of sale of goods, the place of performance is the place where, under the contract, the goods were delivered or are to be delivered; in the case of provision of services this place is the place where, under the contract, the services were provided or are to be provided. According to Kropholler (p. 141, no. 41), Article 5(1)(b) is only applicable if there is a provision on the place of performance in the contract. If there is no provision, the jurisdiction of the court seised is to be determined in accordance with Article 5(1)(a), which has the same wording as Article 5(1) of the Brussels Convention. This means that if there is no contractual provision on the place of performance, this place is to be determined by the rules of private international law of the Member State whose courts are seised, as it was decided in *Tessili*. The defendant can be sued in a court according to Article 5(1)(b) not only on the issue of delivery but also on the issue of the payment, unless the contract determines the place of payment. On the other hand, if Article 5(1)(a) applies, the defendant can only be sued on the issue of the obligation in question. In the reviewer's opinion if the contract lacks a provision on the place of delivery and if the goods are not yet delivered, the jurisdiction of the court seised is still to be determined by the rules of private international law of the forum under Article 5(1)(b). The defendant can be sued for all issues arising from a contract under this paragraph. This approach enhances predictability and certainty, as it is no longer necessary to identify the obligation in question which is the basis for the claim. And, importantly, the fragmentation of jurisdiction is avoided. The only relevant obligation is the delivery of goods, in the case of sale of goods, and the providing of service, in the case of a service contract.<sup>6</sup>

In the Brussels I Regulation there is new Section 5 of Chapter II on Jurisdiction over individual contracts of employment.<sup>7</sup> According to Article 19 the employer who is domiciled in a Member State can be sued in the courts of the state where he is domiciled or in the courts of the Member State where the employee habitually carries out his work or in the case he does not do so, in the courts of the place where the business which engaged the employee is or was situated. In accordance with Article 20 the employee can only be sued in the courts of the Member State in which he is domiciled. Kropholler does not mention this change of the provision on individual contracts of employment compared to the Brussels Convention. The Brussels Convention also creates the possibility of suing the employee in the courts of the contracting state of the place where the employee habitually carries out his work (Art. 5(1)). It is not clear why this possibility is abolished in the Regulation. It has already led to a written question in the European Parliament<sup>8</sup> and to a Dutch proposal to amend

Article 20 of the Brussels I Regulation.<sup>9</sup> According to this proposal it should be possible for the employer in the case of termination of an employment contract to sue the employee in the courts of the Member State where the employee habitually carries out his work. In reply to the parliamentary question the EU commissioner Vittorini emphasised out that at this stage the Commission does not intend to propose an amendment. No later than five years after entering into force a report on the application of the Regulation will be presented and, if necessary, proposals will be made.

Kropholler mentions that according to the case law of the Court of Justice there is a little possibility for recognition and enforcement of protective and provisional measures granted under Article 31 of the Brussels I Regulation (p. 364, no. 24).<sup>10</sup> In the reviewer's opinion this conclusion is incorrect. In the *Van Uden* decision, the Court upheld that a measure granted under Article 24 Brussels Convention (= Art. 31 Brussels I Regulation) is a judgment within the meaning of the Convention, if the granting of the measure is conditional on the existence of a real link between the subject matter of the measure sought and the territorial jurisdiction of the contracting states of the court seised. In the *Mietz* decision the Court held, that if the measure ordered is a measure within the meaning of Article 24 Brussels Convention, it can be enforced under the Title III of the Convention. According to this case law a real link between the jurisdiction of the court and the measure ordered exists if there are – or will be – any assets of the defendant within the confines of the territorial jurisdiction of the court.

In accordance with Article 34(1) of the Brussels I Regulation the recognition of a judgment of a court of a Member State can be refused if the recognition of this judgment is manifestly contrary to the public policy of the Member State in which the recognition is sought. According to the case law of the Court of Justice, this provision is to be used restrictively. In *Renault v. Maxicar* the Court rendered that even a wrong application of the European anti-trust law is not to be considered to be contrary to the public policy within the meaning of Article 34(1) of the Brussels I Regulation.<sup>11</sup> Kropholler mentions that the recognition of a judgment can be refused in Germany if such a recognition is contrary to the provisions of German anti-trust law (p. 398, no. 17). In the reviewer's opinion, it follows from the *Renault v. Maxicar* judgment, that if a judgment in breach of the European anti-trust law is not contrary to the public policy of the Member States, a judgment in breach with national (anti-trust) law can neither be contrary to public policy.

Notwithstanding these minor remarks Kropholler's study on the Brussels I Regulation is an excellent book. The accuracy by which it is always renewed is remarkable. It remains an international source of information on the interpretation of the provisions of the Brussels I Regulation, as it based not only on German case law, but also on case law in this area in many countries of the European Union.

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1. Council Regulation No. 44/2001 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *OJ L* 12/2001, p. 1. This Regulation replaces the Brussels Convention.
2. Council Regulation No. 1347/2000 on Jurisdiction and Enforcement of Judgments in Matrimonial and Parental Matters, *OJ L* 160/2000, p. 19. More specifically on this subject Th.M. de Boer, 'Jurisdiction and Enforcement in International Family Law: a Labyrinth of European and International Legislation', 49 *NILR* (2002) p. 307.
3. Council Regulation No. 1348/2000 on Service of Documents in Civil and Commercial Matters, *OJ L* 160/2000, p. 32.
4. Council Regulation No. 1206/2001 on Taking of Evidence in Civil and Commercial Matters, *OJ L* 174/2001, p. 1.
5. Case 12/76, *Tessili v. Dunlop* [1976] *ECR* 1473; Case C-440/97, *Groupe Concorde* [1999] *ECR* I-6307, 49 *NILR* (2002) p. 109 Note Zilinsky.
6. K. Takahashi, 'Jurisdiction in matters relating to contract: Article 5(1) of the Brussels Convention and Regulation', 5 *ELR* (2002) p. 549.
7. Section 5 (of the Brussels Convention) on exclusive jurisdiction is renumbered and became Section 6 of the Brussels I Regulation.
8. E-0785/2002, *OJ C* 309E/2002, p. 47.
9. 19 November 2002, 14363/02, JUSTCIV 181.
10. Case C-391/95, *Van Uden v. Deco-Line* [1998] *ECR* I-7091, 46 *NILR* (1999) p. 106 Note Vlas;
- Case C-99/96, *Mietz v. Intership Yachting Sneek* [1999] *ECR* I-2277, 46 *NILR* (1999) p. 129 Note Ibili.
11. Case C-38/98, *Renault v. Maxicar* [2000] *ECR* I-2973.

P.C. RAO; R. KHAN, eds., *The International Tribunal for the Law of the Sea*, Kluwer Law International, The Hague 2001, 238 + ix pp., US\$86/UK£59/€93. ISBN 90-411-1601-X.

This book on the law and practice of the International Tribunal for the Law of the Sea (hereinafter: ITLOS), written by sitting judges, is certainly a welcome first-hand source of information on this new permanent Tribunal, which held its first session during the month of October 1996. The *status iuris* of this book is October 2000, meaning that it covers the practice of the first four years of this institution. The latter covers a nice sample of the different procedures possible before this Tribunal. Besides one case on the merits (the *M/V 'SAIGA' (No. 2)* case (*Saint Vincent and the Grenadines v. Guinea*)), it is maybe more important to note that this practice, short as it may be, nevertheless also covers two totally new procedures in international adjudication law, where the ITLOS has received almost exclusive compulsory jurisdiction under the 1982 Convention on the Law of the Sea (hereinafter: 1982 Convention). It concerns first of all the power to prescribe provisional measures in cases where the parties are still in the process of constituting an arbitral tribunal (1982 Convention, Art. 290(5)), and secondly the competence to order the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security (1982

Convention, Art. 292). The first procedure was applied in the *Southern Bluefin Tuna* cases (*New Zealand v. Japan*; *Australia v. Japan*), the second one in the first case decided by the ITLOS, namely the *M/V SAIGA* case (*Saint Vincent and the Grenadines v. Guinea*), as well as in the *Camouco* case (*Panama v. France*).

A few caveats should, however, be taken into account as far as the structure of the book is concerned. First of all, not all judges sitting on the bench during that time period contributed to this book. Only about half of them did so, including all those who have so far served as President or Vice-President of the ITLOS. The latter group consists of the judges Mensah, Nelson, Rao, Vukas and Wolfrum. The former includes, besides those just mentioned, judges Akl, Anderson, Treves and Yankov, all at present members of the bench, as well as judge Eiriksson, who served until 2002, and judge Laing, who deceased in 2001.<sup>1</sup> Secondly, some participating judges submitted multiple contributions to this book (namely judges Rao, Treves and Wolfrum). Thirdly, as stated in the preface, this book is based on articles which had already been published in the *Indian Journal of International Law*. Most of them were published in volume 37 (1997), while three appeared in volume 38 (1998). Moreover, the introductory overview written by judge Rao and one of the contributions of judges Treves and Wolfrum were based on previous publications elsewhere. Given the *status iuris* of this book mentioned above, this implies that some updating was apparently at hand. No uniformity can be noted in this respect. While some authors even exceeded the expectations by including information dating beyond October 2000, sometimes the updating seems to have been limited to the adding of an additional final paragraph.

There exists of course no more authoritative source to write on the law and practice of the ITLOS than the judges of that institution themselves. Especially if a particular judge writes about procedural rules in the development of which he himself happened to have played a quintessential role. Who, for instance, is better qualified to write about the guidelines on how cases are to be prepared and presented before the ITLOS, than the judge who was requested to prepare, together with a colleague, a draft on the question for the Tribunal to consider? The latter subsequently served as basis for the issuing by the Tribunal on 28 October 1997 of the Guidelines Concerning the Preparation and Presentation of Cases Before the Tribunal (ITLOS/9; hereinafter: Guidelines). Further, who is in a better position to write about the internal judicial practice of the ITLOS, than the person who was asked by that body to prepare a survey of the working methods followed by other courts and tribunals on the international, regional, as well as national level, and to offer suggestions in this respect? It was indeed on the basis of the latter suggestions that the Resolution on the Internal Judicial Practice of the Tribunal was adopted on 31 October 1997 (ITLOS/10; hereinafter: Resolution). And even though both these documents are said to be under the permanent review of the Tribunal (with respect to the former, see the opinion of one of its founding fathers (p. 193); with respect to the latter, see Art. 13 of that document), it has so far not proven necessary to do so. The situation with respect to the Rules of the ITLOS (hereinafter: Rules), third and final procedural document elaborated so far by this body to secure its proper functioning in furtherance of Article 16 of Annex VI of the 1982 Convention (entitled Statute of the

ITLOS),<sup>2</sup> might appear slightly different for a draft of this document had already been prepared by the Preparatory Commission of the International Seabed Authority and the ITLOS, as this body *grosso modo* functioned between the signature and the entry into force of the 1982 Convention. Even though this is not explicitly mentioned in the book, the author of the contribution on the Rules nevertheless served a very similar role in the preparation of this document as his colleagues with respect to the two other documents just mentioned. Being the direct source in which the Guidelines as well as the Resolution find their origin (see Rules, Arts. 50 and 40 respectively), it plays a crucial role in the proper understanding of the work of the ITLOS. The Guidelines, it should be noted, are said not to bind the parties even though 'the Tribunal would expect the parties to follow them ...' (p. 188).

But also more generally, it can be easily understood that judges of a newly established tribunal are best placed to comment on the proper working of this newly established organizational framework, consisting to a large extent of Rules, a Resolution and Guidelines, which they themselves created. A red thread running through the different parts in this respect is certainly that the practice of the International Court of Justice (hereinafter: ICJ) served as point of reference, but at the same time that clarifications and innovations were not shunned where thought appropriate or necessary, especially if they could render the ITLOS more cost-effective and user-friendly.

As could be expected, the advantages of opting for the ITLOS under Article 287 of the 1982 Convention, instead of the ICJ, arbitration or special arbitration, are duly emphasized throughout this book and states are repeatedly urged (pp. 25, 54, and 130) to consider making a positive choice, which, it is reminded, can be made at 'any time' (1982 Convention, Art. 287 (1)), since the default option, i.e., arbitration, does not necessarily reflect the true will of the state parties. Especially in comparison with the ICJ, the only other standing judicial body in the list, a good number of advantages of the ITLOS are highlighted: its more equitable geographic representation; its more modern procedure, at times ground-breaking, as for instance the possibility for other entities than states to appear in contentious cases before one of its chambers or in cases submitted by means of any other international agreement conferring such jurisdiction; its novel procedures relating to provisional measures awaiting the setting up of an arbitral tribunal and to prompt release of vessel procedures in instances specifically provided for in the 1982 Convention, as already mentioned above; the introduction of compulsory conciliation in some instances not entailing binding decisions; provisional measures that can be prescribed for the prevention of serious harm to the marine environment, i.e., an interest not solely related to the safeguarding of the rights of the parties as provided by Article 41 of the Statute of the ICJ; the establishment of private meetings of judges between the end of the written pleadings and the beginning of the oral procedure; or the explicit possibility to appoint experts to assist the ITLOS in rendering its decisions.

Nevertheless, and maybe less expected, the attention of the reader also is drawn to advantages which the ICJ might have over the ITLOS, as, for instance, the issue of the enforcement of the decisions rendered. The provision of Article 94(2) of the Charter of the United Nations, entrusting the Security Council with the power to enforce compliance, indeed

finds no correlative in the ITLOS setup, as duly stressed by several authors of the book. Also the fact that no other organs besides the Assembly and the Council of the International Seabed Authority can ask for an advisory opinion in the framework of the ITLOS is regrettable, especially since it appears particularly awkward that a specialized organization like the International Maritime Organization could possibly turn to the ICJ in this respect, but not to the ITLOS.

Moreover, if on a particular point the specialized literature appears to be divided, the book not necessarily adheres to the interpretation granting the ITLOS the broadest possible powers. Can this new judicial body also deal with cases that are not related to the law of the sea, but which parties might be willing to submit to it? The problem here is the difference between Article 288(2) of the 1982 Convention, which speaks about ‘an international agreement related to the purposes’ of that Convention, and Article 21 of the Statute, which simply mentions ‘any other agreement’. Several judges favor the restrictive approach in this respect, even though voices to the contrary can be found in the literature (pp. 53 and 68; but see p. 114 where one judge simply mentions this ‘debated question’ without taking position).

The book has been subdivided in a chapter on organization (II), one on competence (III, by judge Treves), one on procedure (IV), one on internal functioning (V, by judge Anderson writing on the Resolution) and one on miscellaneous issues, called ‘General’ (VI), where judge Laing focuses on the automation of international judicial bodies. Only the chapters on organization (II) and procedure (IV) have multiple entries. The former has been subdivided in three sub-chapters: a first one (A) on the Tribunal, where judge Mensah places the ITLOS in the broader framework of the international system of peaceful settlement of disputes, judge Yankov does likewise, but this time in the broader framework of the system of dispute settlement provided by the 1982 Convention, and judges Nelson and Vukas both treat some specific issues; a second one (B) on the Seabed Disputes Chamber by judge Akl; and a final one (C) on special chambers by judge Eiriksson. The chapter on procedure (IV) has contributions on the Rules (judge Treves), intervention, provisional measures (both written by judge Wolfrum), and the Guidelines (judge Rao). Finally, it should be added for the sake of completeness that the book starts out with a preface and general overview by judge Rao and an introduction by Rahmatullah Khan (chapter I), respective editor and co-editor of the book, and ends up with a useful index.

Having eleven judges write basically about one and the same topic is of course a daring endeavor, especially if overlaps are to be excluded or even minimized as far as possible. As already indicated by the above-mentioned outline of the book, some contributions have a rather similar title. A reader not looking for a particular issue, but rather wanting to have a general overview of the law and practice of this new judicial organ – and thus reading the book from start to finish –, will certainly run into a number of redundant repetitions. The so-called Montreux formula, as incorporated in the 1982 Convention (Art. 287), with the basic choice given to the parties of the 1982 Convention to opt for the method of their own choice; the manner in which the equitable geographic representation is taken care of; the distinctive method of financing when compared with the ICJ; the qualifications of the judges so far

appointed; the reference to Article 95 of the Charter of the United Nations in order to prove that the drafters of that document did not see the ICJ as the sole court on the international arena; the jurisdiction of the ITLOS *ratione materiae* and *personae*; the specific disputes falling under the compulsory jurisdiction of the Seabed Disputes Chamber (1982 Convention, Art. 187), are a sample of such repetitions encountered when reading the book beginning to end. With respect to the fundamental controversy existing in the literature whether the ITLOS, as a distinct institution, has a *raison d'être* on the international level, the authoritative statement by Shabtai Rosenne answering this question in the affirmative is even reprinted twice in a literal manner (p. 58 note 36 and p. 72).

The book reminds the reader of certain historical facts important to fully grasp the present-day procedure before the ITLOS. A case in point being the Seabed Disputes Chamber, which was originally conceived as a separate judicial organ of the International Seabed Authority, but which later lost its independent nature to become part of the ITLOS (p. 51). Also the original idea to have the judges of the Seabed Disputes Chamber of the ITLOS appointed by the Assembly of the International Seabed Authority, stressing that way the institutional link between the Chamber and the Authority, did not materialize (pp. 76-77). But without these *prolegomenae* it is difficult to understand why, at present, the Assembly of the International Seabed Authority has been granted the faculty to 'adopt recommendations of a general nature' concerning the equitable geographical distribution and the representation of the principal legal systems of the world on the bench of the Seabed Disputes Chamber (Statute, Art. 35).

Above all, since the practice of the ICJ serves as point of reference, the book provides an in-depth analysis of the relationship between the procedural rules applicable to the principal judicial organ of the United Nations on the one hand, and the ITLOS on the other. Firstly, it is noted that a number of clarifications were incorporated in the procedural rules of the ITLOS where those of the ICJ seemed to be lacking certain provisions, or the latter proved to be ambiguous or deficient. An example of the latter is, for instance, the fact that a basis of jurisdiction, which needs to be present between the state applying to intervene and the parties to the case before the ICJ (Rules of the ICJ, Art. 81(2)), has been purposely omitted from the Article 99(2) of the Rules in view of the case law of the ICJ. In the *Gulf of Fonseca* case, indeed, the Court had considered this element not to be a requirement for the success of the application. An example of an ambiguous provision can be found in the presumed binding character of provisional measures before the ICJ, which for a long time remained a matter of controversy.<sup>3</sup> This has been clarified with respect to the ITLOS (1982 Convention, Art. 290, and Rules, Art. 89(5)). Examples of instances where concrete rules simply seemed to be lacking under the ICJ system are the *prima facie* jurisdiction requirement when the ITLOS is requested to prescribe provisional measures, to be found explicitly in Article 290(1) of the 1982 Convention. This requirement had only been developed by the case law of the ICJ since its Statute remained silent on the issue. Additionally, the status of the party intervening has been clarified. If under the ICJ one has to turn again to its case law to find out that an intervening party is not bound by the judgement, this was clarified by Article 31(3)



of the Statute which states that such a state is bound by the decision as regards the matter for which it has intervened. This issue is related to the question whether the intervenor becomes a party to the dispute. Under the ICJ case law, this question has been answered negatively in the *Gulf of Fonseca* case. The fact that under the ITLOS system the intervenor can not appoint a judge *ad hoc*, nor object to the discontinuance of the case (Rules, Art. 103(4)), has been said to deny the intervenor of the quality of party to the dispute (pp. 170-171), and thus to resolve yet another question left open by the Rules of the ICJ (p. 146).

But in other instances, where such clarifications would have been at least as welcome as in the instances just mentioned, the obscure provisions of the ICJ were simply taken over. This is apparent in the notion of ‘interest of a legal nature’ as required in the application for permission to intervene (Rules, Art. 99(2)(a)). The same is true with respect to the ‘precise object’ of the intervention, which is also required in that same application (Rules, Art. 99(2)(b)).

The book moreover emphasizes that sometimes, by creating new procedures, new problems are created as well, which are not covered, or only very superficially at best, by any of the procedural instruments of the ITLOS here under consideration. Whether the prompt release of vessel and crew procedure only applies when explicitly provided for in the 1982 Convention, or whether an extensive interpretation can be adhered to in this respect, is apparently an issue which even divides the Tribunal at present as demonstrated in the first *Saiga* case. The provisions on the content of the application of such prompt release procedure are also said to be ‘rather thin’ (p. 155).<sup>4</sup> The limitations to the compulsory jurisdiction, set out in Article 297 of the 1982 Convention leave a substantial grey zone of issues for which it is not immediately clear whether the just-mentioned limitations apply or not, as for instance the system of implied consent included in Article 252 of the 1982 Convention. Also the choice of procedure under Article 287 leaves many questions unanswered, as for instance whether a state which has opted for the ICJ under this provision, and another having accepted the compulsory jurisdiction of the ICJ by means of an optional clause under Article 36(2) of the Statute of the ICJ, can be deemed to have accepted the same procedure under Article 287(4) of the 1982 Convention. One of the compromises reached when establishing the limitations to the compulsory jurisdiction (1982 Convention, Art. 297) is that a court or tribunal, when seized of an application in respect to a dispute referred to in that Article, shall determine either at the request of either party, or even *proprio motu*, ‘whether the claim constitutes an abuse of legal process or is *prima facie* unfounded’ (1982 Convention, Art. 294 (1)). But how exactly this novel preliminary proceeding relates to other preliminary proceedings, such as those relating to preliminary objections, is not clarified by the Rules. As a last example in this respect, one could refer to the prescription of provisional measures by the ITLOS. The relevant provision mirrors Article 75(1) of the Rules of the ICJ, but intentionally left out the first paragraph providing the ICJ the competence to indicate provisional measures *proprio motu*. This has been explained as a *quid pro quo* for the fact that the ITLOS ‘prescribes’ provisional measures whereas the ICJ merely ‘indicates’ them, i.e., the problem of the binding

nature of such measures as already discussed above. But by retaining the second paragraph of that provision (Rules, Art. 89(5)), namely that once seized, the ITLOS 'may prescribe measures different in whole or in part from those requested', this apparently results in a situation where the ITLOS, while not being able to take the initiative itself, can nevertheless decide any measure it deems appropriate, irrespective of the exact nature of the measures requested by the parties, once this body has been regularly seized with such a request.

The present book is undoubtedly a valuable addition to every international law library with a law of the sea or dispute settlement section worthy of that name, for it clearly places the ITLOS on the map of the international dispute settlement bodies. It also pays particular attention to the relationship between the ITLOS and the ICJ, which served as main point of reference. The ITLOS sees this relationship as an horizontal one, whereas the ICJ, having general jurisdiction, might be tempted to consider this relationship to be a rather vertical one. The idea launched by the former President of the ICJ during the 39th meeting of the fifty-fourth session of the General Assembly, held on 26 October 1999, when addressing the General Assembly on the role and functioning of the Court, that 'even international tribunals that are not United Nations organs such as the International Tribunal for the Law of the Sea ... might, if they so decide, request the General Assembly – to request advisory opinions of the Court' (A/54/PV.39), was not particularly well received by the ITLOS and has been qualified in the book as a 'misgiving' (p. 9) of the future development of international law as a result of the proliferation of international tribunals, and the ensuing inherent risk of conflict that such a development entails (pp. 8-10). The repetitive character of some information, the lack of consistency in the abbreviations used (UNCLOS sometimes refers to the Convention, at other times to the Conference), and the occasional contribution where the reader has to augment all internal references by one to find the exact source, do not detract from the very high level of this publication, as far as the content as well as the form is concerned. The editor and co-editor are therefore to be praised for having brought this daring endeavor to a good end.

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1. The ITLOS is composed of 21 judges.
2. Article 16, entitled Rules of the Tribunal, reads as follows: 'The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.'
3. This issue was only recently settled in the *LaGrand* case (*Germany v. United States of America*), *ICJ Reports* (2001) para. 109, where the Court once and for all stated that it had 'reached the conclusion that orders on provisional measures under Article 41 have binding effect'.
4. Sustaining this point, see the recent analysis of the notion 'reasonable bond' by the present author "Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea', 32 *California Western International Law Journal* (2002) pp. 303-342.

R. SENTI, *WTO. System und Funktionsweise der Welthandelsordnung*, Schulthess, Zürich 2000, xxiv + 728 pp., Sfr. 188. ISBN 3-7255-4064-0.

Richard Senti's book *WTO. System und Funktionsweise der Welthandelsordnung* [WTO: System and Functioning of the World Trade Organization] is the first comprehensive treatise in the German language on the World Trade Organisation's (WTO) development and its institutional and legal framework. It is based on Senti's *GATT. System der Welthandelsordnung*, published in 1986, from which pieces were taken up, extended and updated with information on the developments in the GATT/WTO since the publication of the first book. The book consists of eight parts and gives an overview of a wide-ranging area of topics in the WTO arena, providing insight from the economic as well as from the international law perspective.

The first part of the book deals with the history and development of the GATT (General Agreement of Tariffs and Trade), starting with the economic and political situation after the Second World War. The description is mainly focussed on the US position, which was the driving force in establishing an International Trade Organization (ITO), from which only the GATT 1947 remained. The history part continues with the further development of the GATT regulations during the various trade negotiations rounds and ends with the establishment of the WTO at the end of the Uruguay Round in 1994. The first chapter covers more than 100 pages. The author considers this large amount of history to be the necessary basis for understanding the existing WTO state of law. Although the chapter contains a lot of interesting background information and details about the negotiation process, it could have been written in a more concise manner, avoiding existing duplications within the chapter and also with later chapters (e.g., part 1, digit nos. 62 and 114, or part 1 p. 29 and part 3 p. 257). In addition, some more information on the positions of the European players, as well as of developing countries, would have been desirable, in order to get the whole picture.

The second part of the book describes the institutional framework of the WTO, dealing with membership and accession, the organization of the WTO, the decision-making process and the dispute settlement mechanism. The chapter is fairly short and the inclusion of some more details would have been useful, in order to make the functioning of the WTO system fully understandable. In particular, the description of the dispute settlement mechanism lacks additional examples from the vast case law and leaves several questions unanswered. This is regrettable, as the author could have taken more advantage from his experience as a member in various Panels. In digit no. 337 (p. 135), for example, the author describes, under which circumstances dispute settlement procedures may be started. One possibility is that a benefit accruing to a member state under the GATT is being nullified or impaired as a result of a measure of another member state, even if that measure does not conflict with the provisions of the GATT, i.e., does *not* violate GATT obligations. For the reader this scenario would be much clearer if it was illustrated by case law. Some other questions, such as the legal effect of recommendations of the Dispute Settlement Body in national law (p. 146), which is one of the most disputed legal problems, could have been dealt with in greater detail.

as well. In any case, the interested reader finds some reference to further literature in the footnotes.

The third part deals with the general principles common to all agreements in the WTO framework, such as the principles of most-favoured-nation treatment, national treatment, transparency, reciprocity, reduction of trade restrictions, special treatment for developing countries and protection of the environment. The author describes the principles and summarizes the provisions in the GATT, GATS (General Agreement on Trade in Services), TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) and all other related agreements, which refer to these principles (e.g., p. 163 for the most-favoured-nation treatment, p. 197 for the transparency principle). This compilation is a very useful source of information to get an overview of the provisions in the numerous agreements. In some passages of this chapter, like on p. 191, where the violation of the national treatment principle is dealt with, the text of the GATT is illustrated very comprehensibly by relevant case law. Every sub-chapter concludes with a summary of the outstanding problems, which will have to be resolved in the future. This is very valuable, as it gives the reader some policy background on the issues dealt with within the WTO. Again, some of the legal problems could have been discussed in greater detail, such as the concept of 'like product' or the question of trade and environment, where a huge number of cases and negotiations within the WTO committees exist. In the chapter on regional economic integration as an exception of most-favoured-nation treatment, the case of the European Union could have received more attention.

Parts 4 through 8 deal in detail with the provisions of the agreements annexed to the WTO Agreement, which contain substantive WTO law. Parts 4 and 5 describe the GATT and the additional agreements and understandings, which elaborate the provisions of the GATT further. Parts 6 and 7 summarize the GATS and the TRIPS, which contain regulations on services and intellectual property. These are new topics in the WTO, which were added during the Uruguay Round. Part 8 describes the plurilateral agreements on trade in civil aircraft and on government procurement. Throughout these chapters, the author follows the same pattern, describing the background and content of the agreements and then pointing out specific problems and open questions. As the substantive law of the WTO is enormous and hard to overlook, the summarized description of the various agreements is very helpful for getting a quick overview of the content of the agreements and for looking up specific topics.

The last part on the prospects of the WTO contains a brief summary of the Ministerial Conferences in Singapore 1996, Geneva 1998 and Seattle 1999 and mentions open issues, which need to be discussed in the WTO context, and which are to be reformed. These matters were addressed in the Doha Development Agenda and are currently under negotiation.

Overall, Senti's book is a valuable contribution to existing WTO literature, even though it is not as concisely and comprehensibly written as the first edition. For a book of more than 700 pages, the reader would sometimes expect a more in-depth discussion of legal and economic problems, as the author promised in the introduction to his book. Technically speaking, the book could have been edited more carefully, in order to avoid some repetitions,

inconsistencies (e.g., chapter 1 p. 29 and chapter 3 p. 257), and typing errors (e.g., pp. 217, 536). In substance, it would have added further value to the book, if there was a more balanced description of US, European and developing country positions throughout the book. For a comprehensive book on the WTO written in German, which will be read mainly in Europe, in particular more focus on EU positions would have been of interest.

Taken as a whole, the book is an important contribution to make WTO law and policy comprehensible. It gives a broad overview on the state of affairs of the WTO up to the Seattle Ministerial Conference in 1999 and thus provides a solid basis for understanding the current WTO negotiations going on in the framework of the Doha Round. The book is not only valuable for a first touch with WTO law and structure, but also as a reference book for looking up basic information on issues and outstanding problems of the WTO. Even readers with an extensive knowledge on the WTO will find interesting details they are not familiar with. In addition, the book contains a large bibliography, which serves as further reference to get deeper into the various areas of WTO law and practice. Of additional value would have been a table of cases cited, as well as more reference to relevant websites, especially the excellent website of the WTO (<http://www.wto.org>), which is a useful and easily accessible source for documents and further information on the WTO.

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SIENHO YEE; WANG TIEYA, eds., *International Law in the Post-Cold War World: Essays in memory of Li Haopei*, Routledge, London 2001, xxix + 529 pp., hardback, UK£95. ISBN 0-415-23608-8.

This *festschrift* to honour the memory of the eminent Chinese jurist, Li Haopei, comprises thirty-one essays, divided into four sections, covering an extremely broad range of topics. The subjects range from the approach of the Russian Constitutional Court to human rights to the legal regime governing maritime cultural property. Fittingly, in view of Prof. Li's final appointment as Judge of the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, twelve contributions consider either the law of war crimes or the use of armed force in Yugoslavia.

Edward McWhinney opens the brief first section 'Trends and Perspectives' by asking whether international law has undergone a paradigm shift since the end of the Cold War. While the move from a bipolar paradigm to an international system dominated by a single hegemon has enabled certain actions such as the use of force by NATO in Kosovo which would have been unthinkable during the Cold War, McWhinney sees countervailing tenden-

cies at work. The decisive role played by NGO's in securing widespread international agreement to the Land Mines Treaty and to the International Criminal Court demonstrates that international law is no longer 'a highly arcane exercise appropriated by political leaders and their attendant bureaucratic advisers', but a process increasingly open to the influence of civil society. In his contribution, Sienho Yee also identifies a paradigm shift from an international law of co-existence during the Cold War to an emerging international law of co-progressive-ness. Despite admitted 'blemishes', such as the failure of the international community to prevent the genocide in Rwanda, the author, with remarkable optimism, argues that the growing involvement of individuals in international law, greater respect for human and group rights and the more dynamic role of the UN Security Council demonstrate the emergence of an international law whose goal is to ensure human flourishing.

In a second section on 'Sources of International Law', Antonio Cassese considers the new life breathed into the concept of general principles of law recognised by the community of nations by the International Criminal Tribunals. Although the Statute of the Permanent International Court of Justice provided that these general principles constituted a source of law, in practice both the Permanent Court and the International Court rarely mentioned general principles in their decisions. However, as Cassese demonstrates, since international criminal law is 'rudimentary and replete with lacunae', the International Criminal Tribunals have resorted to the concept of general principles in order to clarify questions regarding, for example, the scope of defences concerning duress, necessity and superior orders and the definition of rape.

In a masterly contribution, Bin Cheng returns to the theme of his seminal 1965 paper on customary law, namely the nature of the concept of *opinio juris*. Cheng argues that in suggesting that the only requisite constituent element of general international law is *opinio juris*, he was not thereby dispensing with the need for state practice; in fact, state practice remains the evidence of the *opinio*. Through an analysis of judgments concerning duress as a defence to charges of murder in armed conflict, Bing Bing Jia considers whether judicial decisions themselves can form a source of international law or whether they are simply evidence of a rule derived from precepts of national law. Having considered the judgments of a series of military tribunals, the author concludes that, in view of the substantial differences between the circumstances in which a domestic offence and an international crime are committed, it is indeed the judicial decisions themselves rather than the antecedent municipal law which defines the defence.

Georges Abi-Saab opens the third and longest section 'Substance and theories of international law' by examining the development of the concept of war crimes from the Lieber Code to the Statute of the International Criminal Court. The culmination of this story, namely the definition of war crimes in Article 8 of the ICC Statute, is far broader than general international law on some points, such as war crimes in internal conflicts, yet far more restrictive on others, such as the protection of civilians against bombardment and the use of indiscriminate weapons of mass destruction. Abi-Saab suggests that far from reflecting the state of international law after 140 years of development, Article 8 demonstrates the dominant

influence of the United States over the negotiations; it is unfortunate that space precluded the author from exploring this interesting point in more depth.

Bartram Brown's analysis of the impact of the Asian financial crisis on IMF governance rests on a series of very questionable assumptions. References to a post-war Anglo-American vision of international economic globalisation and to the shared enthusiasm in 1945 of the United States and the United Kingdom for an IMF to support monetary and financial discipline ignore the fact that numerous studies, ranging from Armand van Dormael's meticulous 'Bretton Woods: Birth of a Monetary System' to Robert Skidelsky's more recent biography of J.M. Keynes, have demonstrated that the US and UK were profoundly divided at Bretton Woods on almost every aspect of the IMF. Brown's subsequent suggestion that attempts at the 'negative politicisation' of the IMF's policy on access to its resources have been unsuccessful verges on the surreal in the light of the increasingly overt efforts over many years by the United States to introduce ever-greater conditionality into the Fund's activities.

In a detailed analysis of the jurisprudence of the Russian Constitutional and Supreme Courts, Gennady Danilenko argues that the Courts have adopted an extremely progressive approach to implementing international law. In the *Labour Code* case, for example, the Constitutional Court relied upon a provision of ILO Convention No. 111 which requires states to formulate policies to promote equality of opportunity in order to declare age discrimination in labour relations unlawful. As Danilenko concludes, it 'is unprecedented in the history of international law that such a large country has so rapidly opened itself to direct reception of both treaty and general international human rights law'.

Christine Gray and Vaughan Lowe consider the legality of NATO intervention in Kosovo. In a careful analysis, Gray argues that, despite the arguments put forward by the NATO states in the *Legality of Use of Force* case, it is very doubtful whether previous state practice had given rise to a right of humanitarian intervention. Lowe also reaches the conclusion that there was no clear legal justification for the intervention, but suggests that a right of humanitarian intervention should be encouraged to develop. Lowe argues pragmatically that it would be better to define a narrow legal principle of humanitarian intervention rather than viewing the Kosovo intervention as a *sui generis* action which may subsequently be invoked by any state as a precedent for the use of force in circumstances which it declares to be exceptional. One anomaly in Lowe's interesting paper is the suggestion at p. 282, without any supporting authority, that the US Secretary of State, Madeline Albright, was concerned about the lack of legal justification for the Kosovo intervention. A more accurate description of Albright's deep respect for international law may be found in 'A Very Personal War', the memoir of James Rubin, then US Assistant Secretary of State for Public Affairs. Rubin notes that, on learning that the Legal Adviser to the British Foreign Office had expressed doubts about the legality of the use of armed force, Albright's reaction was: 'Get new lawyers'.

In the final section on courts and adjudication, Ronald St.J. Macdonald considers what means are available to ensure execution of judgments of the European Court of Human Rights now that it is increasingly called upon to deal with grave and endemic breaches of human rights. The author suggests an interesting range of improvements, ranging from conferring

greater monitoring powers on the Committee of Ministers to awarding punitive damages against states which repeatedly fail to comply with their obligations. In a very practical recommendation, Judge Macdonald argues that as Italy violates Article 6 of the Convention ‘on a constant, even a systematic, basis’, punitive damages might lead the Italian government to calculate that it would be cheaper to invest the money in improving the resources of the Italian courts. In an analysis of the *Legality of Use of Force* case, Jiangmin Shen strongly criticises – aided by the powerful dissenting judgments – the reasoning of the International Court concerning both the interpretation of Yugoslavia’s declaration under the optional clause and the ability of the parties to invoke a new ground of jurisdiction after the initial filing of an application.

The editors of this volume have not sought to develop any comprehensive theory concerning the changing nature of international law after the end of the Cold War. Instead, they present a wide-ranging series of snapshots of different areas of international law in flux. As well as the diversity and complexity of the subjects covered, another striking feature of this book is the great warmth of the personal tributes paid to Prof. Li by many contributors. In its breadth and ambition, this book forms a fitting tribute to the memory of a distinguished scholar.

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1. The views expressed are wholly personal and do not represent the views of the European Commission.